BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PEDRO RIVAS	)	
Claimant	)	
VS.	)	
	)	Docket No. 265,344
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant appealed the December 30, 2004, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 29, 2005.

APPEARANCES

Diane F. Barger of Wichita, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent, which is a self-insured company.

RECORD AND STIPULATIONS

The parties agree all of the transcripts and evidence introduced in either this claim or in Docket No. 256,898, which was litigated simultaneously, should be considered in deciding both claims. The parties also agree that Dan R. Zumalt's task list, which sets forth Dr. Peter V. Bieri's task loss opinion and which was attached to respondent's brief to the Board in Docket No. 256,898 as Ex. 1, is part of the record for this claim. In addition, the parties' stipulations are listed in the Award.

The Judge's recitation of the record in Docket No. 256,898 includes a September 13, 2004, deposition of Dr. Vito Carabetta. The reference, however, to such a transcript appears to be an error.

ISSUES

Claimant alleges he injured both shoulders, neck, and upper back due to repetitive traumas while working for respondent. The parties stipulated February 16, 2001, was the appropriate date of accident for these claimed injuries.

In the December 30, 2004, Award, Judge Avery granted claimant permanent disability benefits under K.S.A. 44-510d for an eight percent functional impairment to the right upper extremity and shoulder. The Judge rejected claimant's argument that he also injured his left shoulder.

Claimant contends Judge Avery erred. Claimant argues he injured both shoulders, his neck, and upper back working for respondent. Therefore, claimant argues he has "a permanent partial general disability [under K.S.A. 44-510e] of $100,000.00"[1] Accordingly, claimant requests the Board to modify the December 30, 2004, Award.

Conversely, respondent argues the December 30, 2004, Award should be affirmed. In the alternative, should the Board find claimant injured both shoulders, respondent argues that claimant's award should be limited to his whole body functional impairment rating because the Judge awarded claimant a work disability in Docket No. 256,898, which was decided on the same date, for a low back injury and, therefore, claimant should not receive a duplicate recovery of work disability benefits (a permanent partial general disability greater than the functional impairment rating). And should the Board determine a second work disability is appropriate in this claim, respondent requests a credit as provided by K.S.A. 44-510a for any overlapping weeks of permanent partial general disability benefits.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability for the alleged injuries to his shoulders, neck, and upper back?

2. Is respondent entitled to receive a credit under K.S.A. 44-510a?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. In August 1993, claimant began working for respondent, which operates a meat processing plant. In January 2000, while working as a meat trimmer, claimant began having low back pain. The parties agreed the appropriate date of accident for claimant's low back injury, which was apparently caused by a series of mini-traumas from repetitively bending, was February 24, 2000. Claimant filed a claim for that injury, which was assigned Docket No. 256,898 and which was decided the same date as this docketed claim.

[1] Claimant's Brief at 34 (filed Feb. 11, 2005).

2. Respondent attempted to accommodate claimant's low back injury and, therefore, changed his job duties. Claimant then developed symptoms in his shoulders, neck, and upper back.

3. Claimant filed this second claim for workers compensation benefits alleging he injured his neck, upper back, and both shoulders each workday through February 16, 2001, working for respondent. Respondent agreed to that date of accident for this repetitive injury claim. The facts pertinent to the two docketed claims are intertwined and, therefore, the findings below also refer to the low back injury.

4. When claimant reported his low back symptoms to respondent, the company referred him for medical treatment. In February 2000, claimant first saw Dr. Hutchison, who prescribed medications and physical therapy and also obtained x-rays and a CT scan of claimant's low back. The CT scan revealed a disc bulge at L4-5 and a posterior central disc protrusion at L5-S1. The doctor placed medical restrictions upon claimant. Consequently, respondent moved claimant to a different trimmer job and later moved claimant to other light duty jobs, which over a period of time aggravated his upper extremities.

5. On April 20, 2000, claimant began seeing board-certified orthopedic surgeon Dr. Jeffrey T. MacMillan for his low back complaints. The doctor diagnosed degenerative disc disease at L4-5 and L5-S1 and recommended epidural steroid injections followed by an MRI, if needed. When Dr. MacMillan saw claimant on May 18, 2000, claimant advised he did not want any additional treatment for his low back. Accordingly, the doctor then rated claimant under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.) as having a five percent whole person functional impairment due to the low back injury. The doctor also ordered the first of several functional capacity evaluations.

6. In June 2000, Dr. MacMillan began treating claimant for a left knee problem, which has not been claimed as being work-related.

7. At the request of his then-attorney, Mr. Derek R. Chappell, on August 8, 2000, claimant was evaluated by board-certified orthopedic surgeon Dr. Sergio Delgado for the low back complaints. The doctor recommended epidural injections and possible low back surgery, if the injections did not help.

8. Approximately one week later, on August 16, 2000, claimant returned to Dr. MacMillan. Claimant complained of a considerable increase in waistline discomfort radiating down the left leg. The doctor ordered an MRI of the lumbar spine, which was done on August 30, 2000, and which showed degenerative disc changes at L4-

5 and L5-S1. And when the doctor saw claimant on October 13, 2000, claimant reported left knee pain, increasing low back and upper back pain, and pain between his shoulder blades. But when the doctor saw claimant again on November 10, 2000, the doctor thought claimant was ready to return to unrestricted work. Accordingly, Dr. MacMillan ordered a second functional capacity evaluation, which indicated claimant's primary complaint was pain in his upper back and both shoulder girdles. According to the doctor, the November 2000 functional capacity evaluation indicated claimant made a consistent effort but it also indicated inconsistencies between claimant's pain rating and his observed behavior. On the other hand, the therapist who administered the test concluded the test was valid.

9. In short, by the fall of 2000 claimant was complaining of symptoms in his left knee, low back, both legs, neck and upper back, and both shoulders. Respondent's medical dispensary records dated September 26, 2000, note claimant reported bilateral shoulder pain.

10. Claimant saw Dr. MacMillan again in December 2000 with complaints of right-sided neck pain radiating onto the top of his right shoulder and low back complaints. The doctor recommended lumbar epidural steroid injections followed by a myelogram and EMG and nerve conduction studies. The doctor saw claimant again in late January 2001 and February 2001. At the latter visit, claimant complained of severe pain in his left knee; severe low back pain with pain, numbness, and paresthesia radiating down both legs; and right neck and shoulder pain. Dr. MacMillan restricted claimant from repetitively using his right hand above the shoulder level.

11. Respondent's medical dispensary notes indicate that on approximately February 16, 2001, the company placed claimant off work. And that is the date the parties chose as being the appropriate date of accident for this claim.

12. Dr. MacMillan saw claimant again in March 2001 and recommended an EMG, nerve conduction studies and an MRI of the right shoulder. The EMG and nerve conduction studies were conducted on March 21, 2001, and were normal. At claimant's March 9 and April 25, 2001, office visits with Dr. MacMillan, the doctor noted claimant freely moved his hand far in excess of what claimant represented he was capable of.

13. In May 2001, claimant saw Dr. MacMillan and advised he did not want shoulder surgery. Accordingly, the doctor rated claimant's right shoulder injury and referred claimant for a third functional capacity evaluation. That evaluation was conducted on May 31 and June 5, 2001. According to the corresponding functional capacity report, claimant had not worked since February 16, 2001. Moreover, the therapist concluded claimant gave poor and inconsistent effort throughout the testing.

Accordingly, due to claimant's self-limiting behavior, the therapist was unable to determine claimant's maximal functional capabilities.

14. On June 4, 2001, again at Mr. Chappell's request, Dr. Delgado saw claimant for a second time. This time, the doctor evaluated claimant for the problems he was having with his upper back, neck, and shoulders. Dr. Delgado concluded claimant had bilateral shoulder impingement and a possible rotator cuff tear. The doctor also diagnosed myofascial symptoms in claimant's neck and shoulders. Dr. Delgado recommended conservative treatment such as cortisone injections, therapy, exercise, electrical stimulation, anti-inflammatories, analgesics, and work restrictions. The doctor also noted that claimant might need arthroscopic examination and decompression of both shoulders.

15. Thinking that claimant had reached maximum medical improvement, respondent contacted Dr. MacMillan regarding claimant's permanent work restrictions. Dr. MacMillan had earlier written respondent advising that he was unable to determine claimant's restrictions due to symptom magnification and inconsistent testing. Consequently, in June 2001 respondent asked the doctor what restrictions he would typically place upon someone with claimant's diagnoses. The doctor responded by stating there should be no repetitive or extended periods of bending, stooping, heavy lifting or carrying; no repetitive kneeling or squatting; and no repetitive or extended use of the right hand above shoulder level. The doctor further advised in July 2001 that claimant could lift or carry up to 50 pounds.

16. In late October 2001, claimant attempted to perform a regular duty job, trimming short ribs. But within a few days claimant advised respondent's dispensary that he was unable to perform the work due to pain in his neck, right shoulder, and low back. Shortly afterwards, on November 19, 2001, claimant returned to Dr. MacMillan for additional right shoulder treatment. At that visit, the doctor diagnosed right shoulder impingement syndrome and recommended right shoulder surgery. The doctor immediately wrote respondent and advised that claimant opted for surgery. When the doctor next saw claimant on December 28, 2001, claimant complained of neck pain, right shoulder pain, and pain radiating across the top of both shoulders. The doctor noted claimant remained intent on having the right shoulder surgery, which had been scheduled for January 23, 2002.

17. In the meantime, on December 4, 2001, at Mr. Chappell's request, Dr. Delgado saw claimant for a third time. The purpose of this evaluation was to rate claimant's impairment under the AMA *Guides* (4th ed.). Dr. Delgado concluded claimant had a six percent functional impairment to each upper extremity, which converted to an eight percent whole person impairment, due to his bilateral shoulder injuries. The

doctor also concluded claimant had a five percent whole person functional impairment due to his low back injury.

18. On January 23, 2002, Dr. MacMillan operated on claimant's right shoulder and performed a subacromial decompression and repaired the torn rotator cuff.

19. After recovering from the right shoulder surgery, claimant returned to work for respondent with restrictions and wiped grease off conveyor belts. At claimant's May 10, 2002, visit with Dr. MacMillan, the doctor felt claimant demonstrated signs of malingering. In his May 10, 2002, letter to respondent, the doctor wrote, in part:

> Mr. Rivas demonstrates clear signs of malingering. He demonstrates far more shoulder motion in taking off and putting on his jacket than he demonstrates in formal shoulder range of motion testing. Although he has been in a light duty job, which he says only involves use of his left hand, he reports a two week history of increasing right upper extremity symptoms which he relates to having to wring out the cloth which he uses to wipe the belts at work. At this point, I would suggest electrical studies of his right upper extremity to ensure that he does not have a treatable condition. I would also suggest repeating the functional capacity evaluation to determine some final work restrictions prior to completing his final rating and release.[2]

Consequently, claimant underwent a fourth functional capacity evaluation on May 28 and 30, 2002.

20. Dr. MacMillan saw claimant on June 14, 2002, for a final evaluation. Claimant reported persistent pain in his right shoulder with pain radiating from his neck to his right hand. In addition to the right shoulder problem, the doctor diagnosed right carpal tunnel syndrome, which was confirmed by EMG and nerve conduction studies. The doctor concluded claimant did not want to pursue any additional treatment for his carpal tunnel syndrome and, therefore, the doctor concluded claimant had reached maximum medical improvement. The doctor rated claimant as having a 10 percent impairment to the right upper extremity due to the carpal tunnel syndrome and an additional six percent impairment to the right upper extremity due to his shoulder injury. The doctor also concluded claimant should avoid repetitive use of his right hand and avoid lifting or carrying greater than 10 pounds, with frequent lifting or carrying limited to no more than five pounds.

[2] Stipulation of Dr. MacMillan's Records into Evidence, with attachments (filed Nov. 17, 2004).

21. In late June 2002, claimant reported to respondent's dispensary that he was unable to wipe grease off the belts due to pain in both hands from squeezing a spray bottle. The claimant also noted soreness in his back and objected to the job wiping belts due to the bending and twisting it required. Accordingly, claimant again left work.

22. In August 2002, after Dr. MacMillan had released claimant from treatment, respondent's medical case manager, Lisa Bessmer, attempted to find claimant a permanent regular duty job. According to Ms. Bessmer, the restriction from Dr. MacMillan that provided the greatest obstacle in placing claimant in a permanent position was the restriction against repetitive or extended use of the right hand. And that restriction, which was placed on claimant due to the right carpal tunnel syndrome, effectively limited claimant to one-handed work according to Ms. Bessmer.

23. Respondent accommodated claimant's injuries through September 16, 2002, when he was sent home and placed on a leave of absence. Respondent officially terminated claimant on September 18, 2003, because he had been unable to obtain a regular duty job within his work restrictions during the one-year period of his leave of absence.

24. On October 29, 2002, board-certified orthopedic surgeon Dr. Edward J. Prostic evaluated claimant for Mr. Chappell. The doctor diagnosed low back sprain and strain, for which he suggested epidural steroid injections. The doctor also diagnosed an operated partial thickness rotator cuff tear in the right shoulder, for which the doctor recommended anti-inflammatories and therapeutic exercises. In addition, Dr. Prostic believed claimant needed carpal tunnel release surgery on the right wrist. In short, the doctor did not feel claimant had reached maximum medical improvement.

25. At Mr. Chappell's request, on March 11, 2003, Dr. Prostic examined and evaluated claimant for a second time. During that examination, the doctor found slight improvement in the range of motion in claimant's low back and rated claimant under the AMA *Guides* (4th ed.) as having a 10 percent whole person functional impairment. Moreover, Dr. Prostic concluded claimant did not need any work restrictions for his low back.

26. Dr. Prostic also evaluated claimant's right upper extremity at their March 11, 2003, meeting. Dr. Prostic, unlike Dr. Delgado, found neither crepitus nor impingement in the shoulder. Dr. Prostic determined claimant had a 16 percent functional impairment to the right upper extremity due to his shoulder injury. Moreover, Dr. Prostic recommended that claimant perform only minimal activities with his right hand at or above shoulder height, avoid repetitive heavy lifting with his right arm, lift

no more than 45 pounds to waist height or 20 pounds to shoulder height occasionally, or one-half those amounts repetitively. Dr. Prostic did not rate claimant's left upper extremity and did not recall claimant ever making any left shoulder complaints.

27. While this claim was pending, claimant obtained a new attorney, who asked Dr. Delgado to examine and evaluate claimant for a fourth time. Dr. Delgado saw claimant on March 11, 2004, and diagnosed chronic low back pain, crepitus and impingement syndrome in both shoulders, and right carpal tunnel syndrome. The doctor, however, admitted he conducted several tests that were negative for impingement and that crepitus was the most significant positive finding that he could recall.

28. As a result of the March 2004 examination, Dr. Delgado modified the earlier rating he had provided in December 2001 by adding an amount for the right carpal tunnel syndrome. The doctor, however, did not disturb his earlier ratings of five percent to the whole person for the low back injury or the six percent functional impairment to each upper extremity (or eight percent to the whole person) for the bilateral shoulder injuries. Moreover, Dr. Delgado recommended claimant avoid repetitive bending, stooping, and twisting due to his low back. The doctor also recommended claimant avoid repetitive use of his upper extremities due to the carpal tunnel syndrome and avoid lifting more than 10 pounds overhead due to both his low back and shoulders.

29. On August 20, 2004, Dr. Peter V. Bieri evaluated claimant at Judge Avery's request. During that evaluation, claimant complained of severe and persistent low back pain, persistent neck pain that radiated into both shoulders (greater on the right than the left), and pain, numbness, and tingling in the right hand and wrist. Using the AMA *Guides* (4th ed.), Dr. Bieri determined claimant had a six percent functional impairment to each upper extremity due to crepitance and shoulder impingement syndrome and a five percent whole person functional impairment due to the low back injury. The doctor also rated claimant's right carpal tunnel syndrome but that rating is not pertinent to this claim. Moreover, the doctor noted claimant was a rather poor historian.

30. Dr. Bieri also provided his opinion regarding claimant's permanent work restrictions. But the doctor did not specifically separate the restrictions for the low back from those for the shoulders or the carpal tunnel syndrome. In his August 20, 2004, letter to Judge Avery, the doctor wrote, in part:

> Physical restrictions are issued in accordance with the "Dictionary of Occupational Titles", Fourth Edition Supplement, as published by the

> U.S. Department of Labor. Based on review of documentation as provided and the results of clinical examination, **considering the multiple anatomic sites of injury and degree of permanent impairment**, I would conclude the claimant meets the general physical demand level defined as *light-medium*. This would limit occasional lifting to 35 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds of constant lifting. Repetitive gripping and grasping of the right upper extremity should be performed no more than frequently. Shoulder-level and overhead use of the upper extremities should be performed no more than occasionally. Repetitive bending and stooping should be performed no more than frequently. (Emphasis added.)

31. After being terminated by respondent, claimant sought other work in the Emporia, Kansas, area. Claimant, however, who completed the fifth or sixth grade in Mexico and whose labor history is limited to manual labor, has not found other employment. Claimant testified that after respondent sent him home in September 2002 he returned to the meat processing plant on a weekly basis to bid on jobs. Claimant described his job search as checking with two or three potential employers each week, advising them he has medical restrictions and problems with his back and both shoulders.

32. At the February 20, 2004, regular hearing, claimant introduced copies of approximately 10 job applications (Braum's, Pizza Hut, Reeble Inc., Big Lots, Dollar General, Wal-Mart, Dillon Stores, and approximately three unidentified companies) he had completed and submitted. Claimant also noted that some companies he contacted either did not have job applications or did not permit him to complete an application. As claimant neither reads nor writes English, his 17-year-old daughter completed the job applications.

33. At his March 10, 2004 deposition, claimant introduced two more job applications (Emporia Amoco and an unidentified company) that he had submitted following the February 2004 regular hearing. At his deposition, claimant testified he had been to the Emporia, Kansas, unemployment office eight to 10 times and had checked the newspaper for jobs approximately four times since September 2002. Moreover, claimant testified he did not feel he could perform any job that would require him to bend even only a few times a day.

34. On July 29, 2004, claimant testified again. Claimant introduced an additional 15 job applications (Phillips 66, Emporia Amoco, Texaco/Conoco Food Mart, Dillon Stores, Reeble Inc., Big Lots, Dollar General, Gambino's Pizza, Taco Bell, Golden Corral, and approximately five unidentified companies) that he had completed and submitted following his previous deposition.

35. Claimant's attorney hired vocational expert Dick Santner to interview claimant and compile a list of the work tasks claimant performed in the 15-year period before developing his low back and shoulder injuries. Mr. Santner met with claimant in October 2003 and identified five former work tasks. Mr. Santner testified that based upon Dr. Delgado's March 2004 evaluation, claimant would be unemployable. In addition, Mr. Santner testified claimant might be unemployable considering all of the restrictions from Dr. MacMillan in light of claimant's work history and education. On the other hand, considering either Dr. Bieri's work restrictions or Dr. Prostic's restrictions, claimant could work and earn between $6 and $7 per hour, or between $240 and $280 per week. During their interview, claimant told Mr. Santner that since leaving respondent's employment he had primarily applied for custodial jobs in the Emporia area but claimant could only recall Wal-Mart as being one of the stores where he had applied. Mr. Santner was not asked to consider claimant's retained ability to earn wages based solely upon the low back injury or based solely upon the alleged bilateral shoulder injuries.

36. Respondent hired vocational expert Dan R. Zumalt to analyze claimant's former jobs and comprise a list of the tasks claimant performed in the 15-year period before his work-related injuries. Mr. Zumalt met with claimant in October 2003 and identified 13 former tasks from the job descriptions provided by claimant. On the other hand, Mr. Zumalt identified 14 former work tasks when considering additional information garnered from respondent. Combining the restrictions from Dr. Prostic and Dr. MacMillan, along with claimant's limited English skills, Mr. Zumalt concluded claimant retained the ability to earn approximately $260 per week as a kitchen helper or dishwasher. Mr. Zumalt, likewise, was not asked what claimant could earn considering his low back injury only or claimant's alleged bilateral shoulder injuries only.

CONCLUSIONS OF LAW

Considering the entire record, the Board concludes claimant first injured his low back working for respondent and later both shoulders. Claimant continued to work for respondent and even later developed right carpal tunnel syndrome. Claimant filed separate claims for the low back and bilateral shoulder injuries and the parties attempted to litigate the claims separately. The claims were not consolidated.

The low back injury claim is the subject of Docket No. 256,898. And the alleged bilateral shoulder, neck and upper back injuries are the subject of this claim. Moreover, the parties advised the carpal tunnel claim was settled.

As indicated above, respondent contends claimant injured only one shoulder and, therefore, should receive permanent disability benefits as provided by the schedules in K.S.A. 44-510d. In the alternative, respondent argues that claimant should not receive a work disability in this claim as he should receive a work disability for his low back injury.

1. Did claimant permanently injure only one shoulder, which would be compensated under the schedules of K.S.A. 44-510d, or did claimant injure both shoulders, which would be compensated under K.S.A. 44-510e?

Considering the multiple times claimant complained of bilateral shoulder pain to his doctors and respondent's dispensary, and considering the report of Dr. Bieri, whom the Judge selected to evaluate claimant and provide an unbiased opinion, the Board finds claimant injured both shoulders working for respondent. Dr. Bieri's opinion that claimant sustained permanent impairment in both shoulders due to crepitance and impingement syndrome is credible and adopted by the Board.

On the other hand, the evidence fails to establish that claimant injured his neck or upper back. As claimant has sustained injury to both upper extremities, claimant's right to receive permanent disability benefits is governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as set forth in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that the post-injury wage should be based upon the ability to earn wages rather than actual post-injury wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

The Kansas Court of Appeals in *Watson*[6] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony, concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[7]

2. What functional impairment did claimant sustain due to the bilateral shoulder injuries?

Adopting the findings of Dr. Bieri, the Board concludes claimant has sustained a six percent functional impairment to each upper extremity, or an eight percent functional impairment to the whole person, due to his bilateral shoulder injuries as measured by the

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Id.* at 320.

[6] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[7] *Id.* at Syl. ¶ 4.

Guides. That rating is also substantiated by claimant's expert medical witness Dr. Delgado.

3. What is claimant's task loss, if any, due to the bilateral shoulder injuries?

As indicated by the Judge, the evidence regarding task loss is muddled. First, Dr. Delgado reviewed Mr. Santner's list of five former work tasks and appears to have concluded claimant should not perform four of them, or 80 percent, due to the bilateral shoulder injuries.[8] Dr. Delgado did not provide an opinion regarding the tasks on Mr. Zumalt's list as the doctor did not have an opportunity to study the document before his deposition in order to formulate an opinion.

On the other hand, Dr. Prostic reviewed Mr. Zumalt's task list and indicated there was one out of 13 non-duplicated tasks, or approximately eight percent, that claimant should not perform due to the bilateral shoulder injuries. Dr. Prostic did not provide an opinion concerning Mr. Santner's list.

And finally, although the record is not entirely clear, it appears Dr. Bieri concluded claimant should no longer perform at least two of the five work tasks on Mr. Santner's list, or 40 percent, and two of the 13 non-duplicated work tasks on Mr. Zumalt's list, or 15 percent, due to the bilateral shoulder injuries. Dr. Bieri did not specifically indicate whether the loss of those work tasks was due to claimant's low back injury, the subsequent bilateral shoulder injuries, or the right carpal tunnel syndrome. Nevertheless, from this imprecise record, it appears Dr. Bieri eliminated tasks numbered 1 and 5 from Mr. Santner's list as those tasks required reaching at the shoulder level and lifting baskets of mushrooms to approximately six feet. This is attributable to the restrictions imposed for the shoulder injuries. The other task from Mr. Santner's list that Dr. Bieri eliminated would appear to have been excluded due to claimant's right carpal tunnel syndrome and his inability to perform repetitive gripping and handling.

Likewise, Dr. Bieri appears to have eliminated the two tasks from Mr. Zumalt's task list that required reaching over the shoulders bilaterally. On the other hand, it does not appear that Dr. Bieri eliminated any of claimant's former tasks from either task list due to the low back injury.

The Board averages the 15 percent and 40 percent task loss opinions indicated by Dr. Bieri and concludes claimant has sustained a 27.5 percent task loss due to his bilateral shoulder injuries.

[8] Delgado Depo. at 30-32.

4. What is the difference in the wages claimant was earning at the time of the injury as compared to the wages he is earning or is capable of earning after the injury?

As indicated above, the Kansas appellate courts have held a worker must make a good faith effort to find appropriate employment or a post-injury wage will be imputed for purposes of determining the worker's permanent partial general disability under K.S.A. 44-510e.

Claimant last testified in late July 2004, at which time he remained unemployed. Over the 22 months following claimant's last day of working for respondent, he had submitted approximately 27 job applications with prospective employers. Claimant testified he was contacting two or three potential employers each week but the record does not contain any information regarding those contacts such as the name of the company, the date of the contact, how they were contacted, how many companies were contacted more than once, or any other information to assist in determining whether claimant was making a good faith effort to find work. The record also discloses that over the 22-month period in question, claimant contacted the Emporia unemployment office only eight to 10 times and checked the newspaper want ads only a handful of times.

The various job applications that claimant allegedly submitted to prospective employers indicate that claimant sometimes restricted the hours or the days that he was available for work. And those hours and days varied among the applications. Some of the restrictions claimant noted are inconsistent among the various applications. Moreover, one application indicated claimant was looking for work because his attorney had told him to and many indicated claimant volunteered that he had been injured and respondent could not retain him due to his medical restrictions.

Considering the entire record, the Board concludes claimant failed to prove he made a good faith effort to find work after September 2002, when he last worked for respondent. Accordingly, the Board must impute a post-injury wage in determining claimant's permanent partial general disability.

Mr. Santner determined claimant retained the ability to earn between $240 and $280 per week and Mr. Zumalt determined claimant can earn $260 per week. As indicated above, the vocational experts were not asked what claimant could earn considering the bilateral shoulder injuries only.

The Board concludes claimant's bilateral shoulder injuries have restricted the jobs and tasks that claimant can now perform and, therefore, has reduced his ability to earn wages. Likewise, the bilateral shoulder injuries contributed to claimant's termination from respondent's employ and have contributed to his present lack of employment. Based on

this record, the Board finds claimant retains the ability to earn at least $260 per week despite his bilateral shoulder injuries. Consequently, that sum should be used for the wage loss prong of the permanent partial general disability formula.

The parties stipulated $437.03 was claimant's average weekly wage on the date of accident. Comparing $437.03 to the post-injury wage of $260 yields a wage loss of 40.5 percent.

5. What is claimant's permanent partial general disability under K.S.A. 44-510e?

Computing claimant's permanent disability rating under K.S.A. 44-510e is a simple mathematical computation once the task loss and wage loss percentages are determined. Averaging the 27.5 percent task loss with the 40.5 percent wage loss yields a 34 percent permanent partial general disability, which would not commence until September 17, 2002, when claimant last worked for respondent. Before that date, claimant's permanent partial general disability under K.S.A. 44-510e is limited to the eight percent whole person functional impairment rating as there is no proof that claimant was earning less than 90 percent of his pre-injury wage.

Accordingly, the December 30, 2004 Award should be modified. Claimant is entitled to receive benefits for an eight percent permanent partial general disability through September 16, 2002, followed by a 34 percent permanent partial general disability.

6. Is respondent entitled to a credit under K.S.A. 44-510a during the overlapping weeks of permanent disability benefits that are awarded in Docket No. 256,898 and this claim?

For any overlapping weeks of permanent disability benefits that are awarded in this claim and in the claim for the low back injury, Docket No. 256,898, respondent is entitled to a credit. K.S.A. 44-510a provides:

> (a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later

> injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.
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> (b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury. This reduced amount of compensation shall be the total amount payable during the period of time provided in subsection (a), unless the disability award is increased under the provisions of K.S.A. 44-528 and amendments thereto.

The Board finds and concludes that both claimant's low back injury and bilateral shoulder injuries contribute to his reduced ability to work and the resulting wage loss. Claimant's bilateral shoulder injuries and resulting disability are superimposed upon the disability claimant sustained from the low back injury when considering claimant's ability to re-enter the open labor market and find appropriate employment. When respondent attempted to provide light duty work to claimant, he complained to the dispensary of increased pain in both his low back and his upper extremities. Accordingly, claimant's disability from the low back injury contributes 100 percent to the resulting disability from the bilateral shoulder injuries. Therefore, the permanent disability benefits paid in Docket No. 256,898 for the low back injury shall be deducted from the weekly permanent disability benefits due for the bilateral shoulder injuries for any overlapping weeks of permanent disability.

AWARD

WHEREFORE, the Board modifies the December 30, 2004 Award and grants claimant benefits for an eight percent permanent partial general disability through September 16, 2002, followed by a 34 percent permanent partial general disability, subject to a reduction of benefits as provided by K.S.A. 44-510a for the overlapping weeks of permanent disability benefits stemming from the low back injury in Docket No. 256,898.

Pedro Rivas is granted compensation from IBP, Inc., for a February 16, 2001 accident and resulting disability. Based upon an average weekly wage of $437.03, Mr. Rivas is entitled to receive the following disability benefits:

Mr. Rivas is entitled to receive 22.29 weeks of temporary total disability benefits at $291.37 per week, or $6,494.64.

For the period ending September 16, 2002, Mr. Rivas is entitled to receive 32.62 weeks of permanent partial general disability benefits at $291.37 per week, or $9,504.49, for an eight percent permanent partial general disability.

For the period from September 17, 2002, through January 5, 2004, Mr. Rivas is entitled to receive 68.06 weeks of permanent partial general disability benefits at $291.37 per week subject to a credit of $303.20 per week, for a net benefit of $0.00 per week, and commencing January 6, 2004, Mr. Rivas is entitled to receive 37.94 weeks of permanent partial general disability benefits at $291.37 per week, or $11,054.58 for a 34 percent permanent partial general disability.

The total award is $27,053.71, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director